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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - CENTRAL DISTRICT

OMAR RODRIGUEZ; CINDY GUILLEN-GOMEZ; STEVE KARAGIOSIAN; ELFEGO RODRIGUEZ; AND JAMAL CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT; CITY OF BURBANK; AND DOES 1 THROUGH 100, INCLUSIVE.

Defendants.

BURBANK POLICE DEPARTMENT; CITY OF BURBANK,

Cross-Complainants,

-vs-

OMAR RODRIGUEZ, and Individual,

Cross- Defendant

CASE NO.: BC 414 602

Assigned to: Hon. Joanne B. O'Donnell, Judge

PLAINTIFFS' REPLY TO DEFENDANT CITY OF BURBANK AND UNIDENTIFIED POTENTIALLY AFFECTED OFFICERS OF THE BURBANK POLICE DEPARTMENT'S OPPOSITIONS TO PLAINTIFFS' PITCHESS MOTION

Date: March 11, 2011
Time: 9:00 a.m.
Place: 707 Wilshire Boulevard, 46th Floor
Los Angeles, CA 90017

Complaint Filed: May 28, 2009

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant objects to the production of records pertaining to those officers who are specifically named in Plaintiffs' Complaint as having furthered discrimination, retaliation and harassment within the Burbank Police Department. However, Plaintiffs have clearly attested in their Pitchess motion and attached declaration both why those officers' personnel records are material to the case and how those records will be used in this litigation. Although Defendant feigns surprise at the breadth of Plaintiff's motion, the Court should be mindful of the fact that (a) this Pitchess motion is expansive because it must effectively serve as a document production request, as nearly all relevant evidence is protected by the Pitchess privilege and (b) again, it is well settled that **the government cannot invoke the [Pitchess] privilege to withhold relevant evidence**, as Defendant is attempting to do here. (*Garden Grove Police Dept. v. Super. Ct.*(2001) 89 Cal.App.4th 430, 433.

The critical question in Pitchess jurisprudence is how much detail a party must include in his or her declaration to obtain discovery. In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1025-1026. the California Supreme Court set forth the minimal showing a party must make in order to obtain an in camera review of police personnel records. The Supreme Court in *Warrick* specifically rejected arguments that a party should establish that its scenario was "objectively plausible" or that there was a "reasonable probability" its version of events occurred. *Id.* Under *Warrick* a trial court cannot deny a Pitchess motion simply because it believes the moving party's version is unlikely. *Id.* A trial court hearing a Pitchess motion is not tasked with determining whether a defendant's allegations are credible or believable. *Id.* A trial court does not weigh or assess the allegations contained in a Pitchess motion and does not determine whether they are persuasive. A party does not have to provide corroboration of his or her version of events and does not have to provide a motive for the alleged officer misconduct. *Id.* Here, the City of Burbank cannot unilaterally decide which of Plaintiffs' allegations are "relevant" or "privileged," and then refuse to produce documents it simply feels like keeping in the dark.

This Reply will serve as Plaintiffs' response to the City of Burbank's Opposition as well as

the Opposition to the "Unidentified Potentially Affected Officers of the Burbank Police Department," ("UPAOBPD") since the basic argument posed by the UPAOBPD can be subsumed in this Opposition. Further, Plaintiffs have serious doubts that Meyers, Nave, Riback, Silver & Wilson– now the seventh defense law firm in this case– has the ability to file paperwork on behalf of nonexistent, potential "clients" instead of an actual person or entity. In fact, the two briefs seem specifically designed to circumvent law and motion page limitation requirements. (California *Rules of Court* 3.1113(d): "Except in a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 15 pages.")[1]

Further, Defendant's argument that Plaintiffs have not identified by name certain police officers and have therefore not abided by the Pitchess criteria is deeply flawed, and leaves Plaintiffs in a classic "Catch-22" situation. The Pitchess framework works best in criminal law cases, in which a criminal defendant can obtain paperwork regarding the peace officer who arrested him. The actual name of the peace officer is readily obtainable in that instance, as would be a discrete charge of misconduct against the officer. In this case, the names of the peace officers are *themselves* protected by the Pitchess privilege, so Plaintiffs can only identify such officers by the criteria enumerated in their Motion. Defendant cannot claim that officers' *names* are the crucial requirement, and then hide behind Pitchess instead of disclosing any names. If the UPAOBPD represented actual persons, then their attorneys would presumably know who they are and would not need to hide behind a concocted moniker.

Nevertheless, the categories that Defendants present no objection to are: (1), (2)(except as to Karagiosian), (4) through (8)(Except as to Karagiosian), (17)(b) through (17)(p), (18)(a) through (18)(j), (19)(b) and (19)(c). This motion should automatically be granted in full as to those categories, since Defendant has now waived any objection. The other categories Plaintiffs will briefly discuss, below. Since Plaintiffs have met all statutory requirements under *Evid. Code* § 1043, this motion should be granted, and an in camera hearing should be scheduled forthwith.

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[1]The day before this Reply was due, Plaintiffs received oppositions from officers Jose Duran, Christopher Canales and Mike Macias. These oppositions are untimely, having been served by mail on March 1, 2011 in violation of *Code of Civil Procedure* § 1005, and should therefore be disregarded entirely by the Court.

II. PLAINTIFFS HAVE MET ALL PROCEDURAL REQUIREMENTS NECESSARY FOR THE COURT TO GRANT AN IN CAMERA HEARING

Defendant correctly reiterates that the "good cause" showing required by Evidence Code § 1043 is a low standard, which merely requires Plaintiffs to "'articulate how the discovery being sought would support'" their claims. (Opposition p.3:14-15, citing *Warrick v. Superior Court* (2005) 36 Cal.4th 1011, 1021). Yet, Defendant's Opposition contradicts its admission, arguing that even those officers whose names are specifically identified in Plaintiffs' Complaint are irrelevant to Plaintiffs' lawsuit. Defendant's argument is wholly illogical.

A Pitchess motion need only include an affidavit showing good cause for the discovery sought, setting forth the materiality of the discovery to the pending litigation, and stating on reasonable belief that the identified agency has the information requested. *Evidence Code* § 1043(b)(3). General allegations of relevancy/materiality are sufficient. *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536. Defendant is not entitled to selectively cherry pick what it thinks is relevant – that is the Court's job during the in camera hearing. *Evidence Code* § 1045. Defendant's argument would appear to be that if an employee has sued the City of Burbank, and it may hurt the City to produce certain documents or identify officers, then that information is irrelevant and privileged. The Pitchess procedure does not operate in that manner. Since the Defendant cannot invoke the Pitchess privilege to withhold relevant evidence, the Court should grant this motion.

A. Plaintiffs Cannot Identify Certain Police Officers by Name in Their Pitchess Motion, Because Those Officers' Names Are Unknown To Plaintiffs And Are Protected by Pitchess to Begin With

Defendant makes the argument that Plaintiffs should be required to disclose the names of each and every officer that would ever potentially be affected by this Motion, and by not disclosing names, Plaintiffs have not "identified" police officers in various categories (Opposition, page 4). Defendant's assertion is fallacious for the following reasons:

(1) Plaintiffs cannot set forth the names of particular police officers when discovery of their identities is already protected by the Pitchess privilege. The Court has stated that "to require specificity in this regard would place an accused in the Catch-22 position of having to allege with particularity the very information he is seeking." *Abatti v. Superior Court*, (2003) 112 Cal. App. 4th 39, 59. Here, Plaintiffs must be allowed to discover relevant information, and if that

information *is an officer's identity*, then obviously Plaintiffs cannot identify in advance the very information they are seeking.

(2) Plaintiffs would not have knowledge of *each and every* subject of the Porto's Robbery investigation (Category No. 3), documents evidencing complaints of discrimination, harassment or retaliation since 1995 (Category Nos. 9-13), complaints by Bill Taylor (Category No. 14), documents generated as a result of this lawsuit (Category No. 15), the Moisa Investigation (Category Nos. 17(q), 18(l) and 19(h)), the Bent Investigation (Category Nos. 17(r), 18(m) and 19(i)). Defendant knows full well who were the subjects of these investigations, and was and is capable at all times of notifying such individuals that their personnel records are being sought by the instant motion. If Defendant failed to do so, it is neither Plaintiffs' fault nor Plaintiffs' problem. Plaintiff timely and properly noticed this motion (even giving the Defendant an *additional* ten days to respond by continuing this hearing from March 1, 2011 to March 11, 2011 at Defendant's request), and therefore Defendant has had more than enough time to notify those individuals.

This motion can be analogized to the issue presented in *In re Valerie E.* (1975) 50 Cal.App.3d 213, in which a party who sought Pitchess records lacked the names of prior complainants against the involved police officers, but instead specified the type of material sought. The Pitchess motion was granted in that case. In the instant matter, Plaintiffs have not specifically identified the (unknown to Plaintiffs) subjects of the investigations noted above, but have provided sufficient information for Defendant to identify such individuals and provide them with whatever notice is required that their records are being sought.

Plaintiffs anticipate that the Court will issue an appropriate protective order that the information and documents produced pursuant to this motion will be produced in a manner that will protect the privacy rights of all officers involved. If the identities of such officers are required to be revealed in this case, then the Court and the parties can agree upon appropriate methods to protect their rights. Therefore, this Motion should be granted.

B. Categories Referencing Prior Job Bias Claims At the BPD Are Material and Discoverable

As more fully described in the affidavit attached to Plaintiffs' Motion (Gresen Declaration, pp. 32-33), Plaintiffs wish to show that the Burbank Police Department had a pattern and practice of

tolerating, or even encouraging, racial or gender bias/discrimination/harassment, sexual harassment, and workplace retaliation. Defendant makes the argument that until the Plaintiffs have actually been harassed, discriminated or retaliated against, the Burbank Police Department *had no duty* to prevent discrimination, harassment, or retaliation against them in the workplace. (Opposition p.6:8-10). This argument is wholly contrary to the prophylactic purpose of the FEHA because, if true, the BPD would have no duty to prevent discrimination, harassment and retaliation in the workplace ***ever*** until an employee is actually discriminated, harassed, or retaliated against. The entire purpose of the FEHA is preventative: "to provide effective remedies that will eliminate...discriminatory practices," not to mete out punishment in the aftermath of a violation. *Government Code* § 12920.

According to *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, cited by Defendant, Plaintiffs cannot sustain a separate cause of action for failure to prevent discrimination and harassment in the workplace if they have not actually been discriminated or harassed. However, even if they have not actually been harassed, discriminated or retaliated against, the duty from their employer still exists. In other words, whether a duty exists or whether a cause of action exists are two separate questions.[2] Here, it has already been alleged in the affidavit attached to Plaintiffs' Motion that they have been discriminated, harassed and retaliated against. Therefore, the job bias claims are clearly relevant to BPD's duty to the Plaintiffs, as it must be assumed for purposes of this motion that Plaintiffs can sustain their separate cause of action for failure to prevent. Therefore, this Motion should be granted.

C. Investigation Documents Are Not Subject to the Attorney Client or Attorney Work Product Privileges

Defendant asserts that the Moisa Investigation and the Bent investigation are subject to the attorney client and/or attorney work product privileges. However, it is well settled that "[i]f a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, **then it will have put the adequacy of**

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[2]As a hypothetical, Person A has a duty not to assault Person B. This duty exists whether or not Person A *actually* assaults Person B, or whether Person B has a *cause of action* for assault.

the investigation directly at issue." *Wellpoint Health Networks v. Superior Court* (1997) 59 Cal. App. 4th 110, 128. (Emphasis added). The investigative conclusions, subjective analysis and methodologies used are likewise pertinent to whether Defendant took immediate and appropriate corrective action based on those conclusions, or whether those conclusions were biased. Plaintiffs clearly have good cause to obtain the details of the investigations, especially when a portion of the defense is based on the notion that Defendant took appropriate action in response to Plaintiffs' complaints.

Therefore, it is well-settled that the Defendant "cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy. The defendant cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney-client privilege and the work product doctrine are thereby waived." *Wellpoint Health Networks v. Superior Court* (1997) 59 Cal. App. 4th 110, 128.

As in *Wellpoint Health Networks*, if Defendant intends to assert at trial that it conducted an adequate investigation of the complaints pertaining to and surrounding Plaintiffs' allegations, "the attorney-client privilege and the work product doctrine are thereby waived." Id. Plaintiff respectfully maintains that Defendant "cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination" of its investigation. *Id.* Therefore, this Motion should be granted.

D. Categories Seeking Investigations and Performance Reviews of Non-party Officers Are Discoverable

The affidavit attached to Plaintiffs' motion describes at length the role that multiple non-party officers (Tim Stehr, Eric Rosoff, Kerry Schilf, Jaime "J.J." Puglisi, Kelly Frank, Pat Lynch, Mike Parrinello, Aaron Kendrick, Darin Ryburn, Angelo Dalia, and Pete Allen)(the "OFFICERS") have in the facts and circumstances forming the basis of this action. Defendant argues that the request is overbroad. (Opposition p. 6). On this issue, Plaintiffs trust that the Court will be able to discern what is relevant from what is irrelevant once it has the personnel files in question, and issue an appropriate order.

Defendant erroneously claims that investigations and performance reviews have nothing to do with discrimination or harassment. (Opposition p. 7:24-25). Plaintiffs seek the investigations

and performance reviews for three reasons: if the OFFICERS have been accused of similar behavior in the past, Plaintiffs are entitled to know (a) what behavior the OFFICERS were accused of, (b) what the repercussions of that behavior were, and (c) whether or not such behavior appears on the OFFICERS performance reviews. Most important, Plaintiffs wish to comment on the *lack* of such behavior being noted in the personnel files of the OFFICERS, since the Plaintiffs repeatedly complained about harassment, discrimination and retaliation. However, in order to do so, Plaintiffs must first request it in this Pitchess motion. Again, Plaintiffs trust that the Court will be able to discern the relevant from the irrelevant, as provided under *Evidence Code* § 1045. Therefore, this Motion should be granted.

E. The Portos Investigations are Material Since They Are Directly Relevant To The Claims In Omar Rodriguez' Complaint

As a preliminary issue, the Portos Bakery Investigations identified by Internal Affairs number (IA#04-26-08-01 and IA#04-16-09-01) in the Pitchess Motion were dated April 2008 and April 2009, well before the May 27, 2009 cut-off date proposed by the Defendant. (Opposition 10:22-26, Declaration of Craig Varner attached to Opposition). Since Defendant has no objection to the production of records before that date, these investigations should be provided in full to the Court. Defendant merely obfuscates this issue by claiming that the Portos Investigations (as well as Officer Dahlia's accusations) took place sometime later.

Furthermore, Plaintiff Rodriguez was placed on administrative leave in April 2009 due to the Portos Bakery Investigations noted above, which again took place before the First Amended Complaint was filed. Further, Plaintiff should be entitled to comment on the investigations as a whole. Defendant cannot claim that the Portos Investigations, and the reasons for the Portos Investigations (i.e. false accusations) were thorough, complete and fair, when Plaintiff only has the ability to comment on a small piece of those investigations. He should therefore be entitled to have the court review the investigations for relevant evidence.

III. PLAINTIFFS HAVE AN ABSOLUTE RIGHT TO THEIR OWN PERSONNEL FILES, IN FULL

Defendant first claims that it has no objection to the production of Plaintiffs' own personnel records, but then attempts to put arbitrary limitations on the production of the same, including but

not limited to time limitations and name redactions. In doing so, Defendant ignores the fact that Plaintiffs have an absolute right under *Government Code* § 3306.5 (part of the "Peace Officers Bill of Rights Act" or "POBRA") to review and copy their own personnel files at any time they so choose. Defendant's refusal to produce to Plaintiffs' entire personnel file is an express violation of POBRA, which provides as follows:

> "(a) Every employer shall, at reasonable times and at reasonable intervals, upon the request of a public safety officer, during usual business hours, with no loss of compensation to the officer, permit that officer to inspect personnel files that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.
>
> (b) Each employer shall keep each public safety officer's personnel file or a true and correct copy thereof, and shall make the file or copy thereof available within a reasonable period of time after a request therefor by the officer."

Defendant therefore has no right to withhold any portion of Plaintiffs' own personnel files from the Plaintiffs for any reason whatsoever. Its refusal to produce the files in full is an express violation of POBRA. Should Defendant continue to refuse to produce Plaintiffs' entire personnel files, Plaintiffs will have clear grounds to file an amended government claim with an additional POBRA violation. This Court should therefore order Defendant to provide Plaintiffs with a copy of their entire personnel files, without limitation.

IV. DOCUMENTS AND INFORMATION CONCERNING CONDUCT PRIOR TO FIVE YEARS FROM THE ACTS ALLEGED IN THE COMPLAINT IS ONLY NONDISCOVERABLE IF SUCH ACTS SPECIFICALLY PERTAIN TO PERSONNEL "COMPLAINTS"

Defendant argues that the Court must exclude from disclosure *any* information which is more than five years old under Cal. Evidence Code § 1045(b). This notion is a complete misreading of the statute. The Court has clearly stated that "the five-year restriction in section 1045... applies only to records of 'complaints, or investigations of complaints, or discipline imposed as a result of such investigations.' Other personnel records... are not so restricted and may be obtained upon proper compliance with Evidence Code section 1043, subject to a relevance determination by the court whether they are 'so remote as to make disclosure of little or no practical benefit.' (Evid. Code, § 1045, subd. (b)(3).)" *People v. Superior Court (Gremminger)*, (1997) 58 Cal. App. 4th 397, 407. Plaintiffs concede that "complaints, investigations of complaints, or

discipline imposed as a result of such investigations" ("complaint documents") that are not already contained in their own personnel files should be limited to five years prior to the events complained about. However, Plaintiff Rodriguez's complaint presents an argument of continuing discrimination in the BPD that goes back to 1995 (not 2006, as the Defendant argues), excluding only those "complaint documents" earlier than 1990 from Pitchess production. (Opposition p. 8:13) Furthermore, per *Evidence Code* 1045(b)(3), non-"complaint documents" which are relevant to any of the Plaintiff's claims are discoverable, *no matter what time period they are from.* Therefore, Defendant's blanket rule that all documents earlier than 2001 for Rodriguez and 1999 for Guillen and Karagiosian is patently incorrect.

In fact, Defendant itself has asked Rodriguez about the 1995 discriminatory failure to promote in deposition, to which Rodriguez provided information. Defendant again cannot have it both ways, in which Rodriguez's Pitchess rights are waived when it wants information from him, but that same information is outside the scope of permissible discovery when Rodriguez wants information from the Defendant. Defendant goes on to claim that Plaintiff's counsel's declaration quotes his request for documents beginning in1995 "without alleging discrimination in these respects." (Opposition 8:23). Apparently it overlooked the part of the declaration which states: "These documents will show that Rodriguez was treated differently than other, similarly-situated officers on account of his race, as other officers who ranked lower than him were promoted first." (Motion, Gresen Declaration p. 35:8-10). "Discrimination" is clearly alleged by the Plaintiffs.

Since the Court should review all potentially relevant documents requested by this motion, Defendant's incorrect statement of the law should be ignored, and this motion should be granted in full.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that the Court grant this motion as to the categories requested herein, as well as for all of the reasons set forth in Plaintiffs' Moving Papers, and order an *in camera* review of the requested personnel files. Plaintiffs agree that the use of any Pitchess materials be (a) subject to a protective order and (b) limited to use in each Plaintiff's respective case. The Court should also allow Plaintiffs to inquire

about the categories requested herein during the remainder of discovery and at trial.

DATED: March 4, 2011

LAW OFFICES OF RHEUBAN & GRESEN

By: _____
JOSEPH M. LEVY
Attorneys for Plaintiffs Omar Rodriguez, Steve Karagiosian, Cindy Guillen-Gomez, Elfego Rodriguez and Jamal Childs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles. I am over the age of eighteen and am not a party to the within action. My business address is 15910 Ventura Boulevard, Suite 1610, Encino, California 91436.

On March 4, 2011, I served a copy of the following document described as PLAINTIFF'S REPLY TO DEFENDANT CITY OF BURBANK AND "UNIDENTIFIED POTENTIALLY AFFECTED OFFICERS OF THE BURBANK POLICE DEPARTMENT'S OPPOSITIONS TO PLAINTIFF'S PITCHESS MOTION on the interested parties in this action as follows:

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XX BY MAIL: By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on that date following ordinary business practices. I am "readily familiar" with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. mail Postal Service in Encino, California, in a sealed envelope with postage fully prepaid.

XX BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail address listed above. My electronic notification address is sf@rglawyers.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A copy of the electronic transmission showing the time of service is attached.

XX STATE: I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTED on March 4, 2011, at Encino, California.

Shannon Ford